IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MITCHEL L. JOSEPH,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13520

Trial Court No. 4TO-18-68 CR

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT
PAUL R. LYLE, JUDGE

BRIEF OF APPELLEE

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VRA CERTIFICATION: I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

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Statutes

Alaska Statute 11.81.900(b) provides in part:

> In this title, unless otherwise specified or unless the context requires otherwise,
>
> . . .
>
> (19) "defense", other than an affirmative defense, means that
>
> (A) some evidence must be admitted which places in issue the defense; and
>
> (B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt[.]

Alaska Statute 28.35.030(n) provides:

> A person is guilty of a class C felony if the person is convicted under (a) of this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense, or punishment under this subsection or under AS 28.35.032(p) was previously imposed within the last 10 years. For purposes of determining minimum sentences based on previous convictions, the provisions of (u)(4) of this section apply. Upon conviction, the court
>
> (1) shall impose a fine of not less than $10,000, require the person to use an ignition interlock device after the person regains the privilege to operate a motor vehicle for a minimum of 60 months, and impose a minimum sentence of imprisonment of not less than
>
> (A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four or more times;

(2) may not

(A) suspend execution of sentence or grant probation except on condition that the person

(i) serve the minimum imprisonment under (1) of this subsection;

(ii) pay the minimum fine required under (1) of this subsection;

(B) suspend imposition of sentence; or

(C) suspend the requirement for an ignition interlock device for a violation of (a)(1) of this section involving an alcoholic beverage or intoxicating liquor, singly or in combination, or a violation of (a)(2) of this section;

(3) shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration of the license under (o) of this section;

(4) may order that the person, while incarcerated or as a condition of probation or parole, take a drug or combination of drugs intended to prevent the consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) shall order forfeiture under AS 28.35.036 of the vehicle, watercraft, or aircraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(6) shall order the department to revoke the registration for any vehicle registered by the department in the name of the

person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle or is registered as a co-owner under a business name, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

Alaska Statute 28.35.032(p) provides:

> A person is guilty of a class C felony if the person is convicted under this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense, or punishment under this subsection or under AS 28.35.030(n) was previously imposed within the last 10 years. For purposes of determining minimum sentences based on previous convictions, the provisions of AS 28.35.030(u)(4) apply. Upon conviction,
>
> (1) the court shall impose a fine of not less than $10,000, require the person to use an ignition interlock device after the person regains the privilege to operate a motor vehicle for a minimum of 60 months, and impose a minimum sentence of imprisonment of not less than
>
> (A) 120 days if the person has been previously convicted twice;
>
> (B) 240 days if the person has been previously convicted three times;
>
> (C) 360 days if the person has been previously convicted four or more times;
>
> (2) the court may not
>
> (A) suspend execution of the sentence required by (1) of this subsection or grant probation, except on condition that the person
>
> (i) serve the minimum imprisonment under (1) of this subsection;

(ii) pay the minimum fine required under (1) of this subsection;

(B) suspend imposition of sentence; or

(C) suspend the requirements for an ignition interlock device;

(3) the court shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration under (q) of this section;

(4) the court may order that the person, while incarcerated or as a condition of probation or parole, take a drug, or combination of drugs intended to prevent consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) the sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the person;

(6) the court shall order forfeiture under AS 28.35.036, of the motor vehicle, aircraft, or watercraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(7) the court shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

STATEMENT OF ISSUES PRESENTED

1. A defendant arrested for DUI must be advised of the consequence of refusing to submit to a breath test. If the defendant is given misinformation about the consequence, they are entitled to suppression but only if they can show their refusal was induced by the misinformation.

Joseph was arrested for DUI. Before administering a chemical test, the trooper advised Joseph that it was his right to refuse, but if he did so, he could be charged with another misdemeanor. Because Joseph had two prior felony DUIs, his refusal would be a felony. He refused to submit to a test and was later charged with felony refusal to submit to a chemical test.

Is Joseph's claim for suppression subject to plain error review? If it is, did the trial court commit plain error when it failed to determine whether Joseph's refusal was induced by the misinformation provided by the trooper?

2. Joseph's lawyer lacked a good-faith basis for questioning the trooper about when Joseph's 2008 felony DUI conviction took place. Did the trial court abuse its discretion by precluding Joseph from cross-examining the trooper on that topic? Did the trial court shift the burden of proof by requiring there to be some evidence that the trooper had personal knowledge of Joseph's 2008 conviction before Joseph could cross-examine him about the conviction?

STATEMENT OF THE CASE

Statement of facts

After receiving a report of a rollover accident between Tetlin and Tok and going to investigate, Alaska State Trooper Anthony Will and Village Public Safety Officer (VPSO) Sadie Warbelow found a truck off the road, "as if it had rolled." [Tr. 47, 102, 105] No one was in or around the truck. [*Id.*] The truck belonged to Joseph. [Tr. 48, 106] No one was in the immediate area of the truck, but the officers could hear someone yelling in the distance. [Tr. 58-59, 117-19] They saw Joseph come out of the woods; he was "staggering a bit." [Tr. 59-60, 119, 124] As Joseph approached the officers, they could see he exhibited some classic signs of intoxication—his eyes were bloodshot and watery, his speech was slurred, and he smelled of liquor. [Tr. 60, 124] Joseph had scrapes on the left side of his face, forearm, and shin, and his clothes had dirt on them; he said he received the scratches from the branches in the trees. [Tr. 61, 63, 123] Joseph told the officers he had been driving until he picked up a Native male hitchhiker, who he let drive. [Tr. 65; 134-35] The officers decided to arrest Joseph and take him to the trooper post. [Tr. 64, 171]

VPSO Warbelow was able to observe Joseph from when they first encountered him until they arrived at the trooper post. [Tr. 64] During that time Joseph continued to exhibit signs of intoxication. [*Id.*] Trooper Will

explained to Joseph how the DataMaster processing would work. [Tr. 150] Joseph told the trooper, "I decline," to which the trooper responded, "I know. But I'm just going to tell you how it works and then if you don't want to then that's your right." [*Id.*] When Joseph changed his mind and asked for a blood draw at "F[airbanks] M[emorial] H[ospital]," the trooper said;

> That's a little far for us. We can't do that here. So I'm going to start this up and it's going to ask for a sample of your breath. If you don't provide it, it going to be an additional charge of refusal to submit to a chemical test, *so it will be an additional misdemeanor*.

[Tr. 151 (emphasis added) (recording of DUI processing played for trial court)]

Course of proceedings

Because Joseph had two prior felony DUI convictions from 2008 and 2011, he was charged with felony DUI and felony refusal to submit to a chemical test. [R. 223-24] Joseph did not move to suppress the evidence of his refusal based on the misinformation the trooper provided. Joseph was tried and convicted of refusal; he was acquitted of DUI.

Joseph appealed, arguing for the first time that evidence of his refusal to submit to a breath test should be suppressed. He also argues that the trial court improperly precluded him from cross-examining Trooper Will about the date of one Joseph's prior convictions.

ARGUMENT

I. A REMAND IS NECESSARY TO DETERMINE WHETHER HE WAS PREJUDICED BY THE TROOPER'S MISINFORMATION

A. Standard of review

This court independently determines whether an appellate claim is subject to plain-error review. *See Chilcote v. State*, 471 P.3d 599, 603 (Alaska App. 2020). This court independently determines whether a concession by the state is well taken. *Id*. at 604. This court independently determines whether misinformation regarding the consequence of refusing to submit to a breath test violated the defendant's due process rights. *See State v. Malloy*, 46 P.3d 949, 951 (Alaska 1979) (independent review of issues of law).

B. The trooper violated Joseph's due process rights by misadvising Joseph that his refusal to submit to a breath test would be a misdemeanor when in fact it was a felony

Under *Olson v. State*, 260 P.3d 1056 (Alaska 2011), Joseph would entitled to suppression of his refusal to submit to a breath test if he could prove that the misinformation he received from the trooper induced him to refuse. *Id*. at 1061. But Joseph never moved to suppress the evidence of his refusal. Joseph, having not raised the claim below, has raised it for the first time on appeal.

Joseph now asserts that the erroneous advisement amounts to plain error and requires either suppression or preclusion of the evidence of his

refusal. [At. Br. 14] If the advisement amounts to plain error, Joseph is entitled to suppression or preclusion only if he can prove he was prejudiced. *Olson*, 260 P.3d at 1064.

The defendant in *Olson*, was arrested for DUI. During the processing, the officer misadvised Olson regarding the look-back period that determines whether refusal is a felony or misdemeanor. The officer told Olson the look-back period was five years, in which case Olson's refusal would be a misdemeanor. But in reality the look-back period was 10 years, which meant that Olson's refusal was actually a felony. The supreme court held "it would be fundamentally unfair to allow the State to assert one penalty, on which the arrestee's decision relies, and then later convict him of a charge that carries a greater penalty." *Olson*, 260 P.3d at 1061,

Here, the trooper told Joseph that, if he refused to submit to the breath test, he would be charged with "an additional misdemeanor." [Tr. 151] But in fact, because of Joseph's prior DUIs, under AS 28.35.032(p), Joseph's refusal was a felony, not a misdemeanor.[1] Joseph was previously convicted of

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[1] Alaska Statute 28.35.030(p) provides:

> A person is guilty of a class C felony if the person is convicted under this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense, or punishment under

felony DUI under AS 28.35.030(n) twice within ten years preceding the date of the present offense (July 15, 2018)—Joseph's look-back period ran from July 15, 2008 until July 14, 2018. His prior convictions were on September 22, 2008, and July 11, 2011. [R. 354, 357]

Like Olson, Joseph was led to believe that his refusal to submit to a breath test would be a misdemeanor, when in fact it was a felony. And, as in *Olson*, it was "fundamentally unfair" to advise Joseph that refusal would be a misdemeanor and then to later charge and convict him of a felony.

C. The erroneous advisement qualifies as plain error

Plain error is an error that (1) is not the result of intelligent waiver or a tactical decision not to object; (2) is obvious; (3) affects substantial rights; and (4) is prejudicial. *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011). Joseph's failure to seek suppression of his refusal based on the misinformation provided by the trooper does not appear to be the product of a waiver or tactical decision.

An error is obvious when it should have been apparent to any competent judge or lawyer. *Adams*, 261 P.3d at 773. The error resulting from the misinformation was obvious in that the conclusive authority, *Olson*, was

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this subsection or under AS 28.35.030(n) was previously imposed within the last 10 years.

decided eight years before Joseph's trial. *Cf. id.* at 773-74 (error was obvious because case law establishing error had been in existence for at least 20 years).

An error affects substantial rights when it relates to the fundamental fairness of the proceeding; a constitutional violation always affects fundamental fairness. *Adams*, 261 P.3d at 773. Here, *Olson* established that the state's reliance on an advisement that could mislead a defendant regarding the legal consequence of refusal decision whether to submit to a breath test was "fundamentally unfair." *Olson*, 260 P.3d at 1061. Thus, the claimed error related to the fundamental fairness of Joseph's prosecution for refusal to submit to a breath test.

Last, an error must be prejudicial. *Adams*, 261 P.3d at 773. A constitutional error will always be prejudicial unless harmless beyond a reasonable doubt. *Id.* Here, the error violated Joseph's due process rights and was therefore prejudicial.

The error in this case satisfies the definition of plain error.

D. Joseph's remedy is a remand to determine prejudice

When the troopers have violated a defendant's due process rights by providing misinformation regarding the consequence of refusing to submit to a breath test, the remedy is suppression only if the misinformation actually induced the defendant's refusal; a defendant who would have refused no

matter what would receive a substantial windfall if suppression were automatic in every case. *Olson*, 260 P.3d at 1061-64. The defendant thus has the "burden [on remand] to prove that he was prejudiced by the extraneous and incorrect information the officer provided him." *Id*. at 1064.

This case should be remanded to give Joseph the opportunity to prove that the misinformation he received induced him to refuse to submit to the breath test.

E. The trooper's advice that Joseph had the "right" to refuse the breath test is not actionable

The trooper told Joseph "if you don't want to [submit to the breath test] then that's your right." [Tr. 150] Joseph asserts that this advice was erroneous. (He does not argue that this claim provides an independent basis for relief.)

Although the advice that he had the right to refuse might be technically incorrect, it is of no legal consequence. There is no right to refuse a breath test "in the statutory sense, in that the arrestee will suffer adverse consequences." *Copelin v. State*, 659 P.2d 1206, 1212 (Alaska 1983), *quoted in Olson*, 260 P.3d at 1060. The supreme court has avoided using the term "right" when referring to a driver's ability to refuse a breath test because refusing is not penalty-free. *Id*. But the distinction "is largely one of semantics" and "is not material to the outcome of this case." *Olson*, 260 P.3d at 1060-61.

Likewise in Joseph's case. That the trooper informed him that he had the right to refuse the breath test is immaterial to the outcome of this case.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING JOSEPH'S CROSS-EXAMINATION OF TROOPER WILL REGARDING THE DATE OF CONVICTION IN JOSEPH'S 2008 JUDGMENT

The state introduced certified copies of Joseph's two prior DUI judgments through Trooper Will. [R. 354-60; Tr. 323] Joseph wanted to cross-examine the trooper regarding whether he had any personal knowledge regarding the dates of convictions. [Tr. 328] When asked if he had any evidence suggesting the dates were inaccurate, Joseph's lawyer said, "I do not." [Tr. 330] The trial court ruled that Joseph's intended line of cross-examination was irrelevant.[Tr. 330-31]

Joseph claims on appeal that the trial court unconstitutionally restricted his right to present a defense by limiting his cross-examination of the trooper. Even though this case must be remanded, this court should decide this issue because if on remand Joseph cannot prove prejudice then the judgment will stand—unless resolution of the cross-examination claim requires reversal and retrial.

A. Standard of review

The court reviews for abuse of discretion a trial court's rulings on the admissibility of evidence and the scope of cross-examination. *McGill v. State*, 18 P.3d 77, 80-81 (Alaska App. 2001)

B. The trial court did not abuse its discretion by limiting Joseph's cross-examination of the trooper because Joseph's lawyer lacked a good-faith basis for questioning the trooper about Joseph's 2008 DUI conviction

To convict Joseph of felony refusal to submit to a chemical test, the state had to prove that he had been convicted of felony DUI two or more times in the ten years preceding the date of the current offense—July 15, 2018. To prove this, the state introduced through Trooper Will certified copies of two DUI judgments, one from September 22, 2008, and the other from July 11, 2011. [Tr. 323-27]

Joseph apparently wanted to challenge whether the 2008 judgment actually fell within the 10en-year look-back period by cross-examining the trooper about the date of the conviction and whether the trooper had personal knowledge about the date of conviction in the earlier case. [Tr. 327-28] The state objected on relevance grounds. [Tr. 328] When asked if he had any evidence that the conviction did not occur on the date reflected in the judgment, Joseph's lawyer said he did not. [Tr. 330] The trial court precluded Joseph from pursuing that line of cross-examination unless he had some evidence that the conviction took place outside the look-back period. [Tr. 330-32] That ruling was not erroneous.

Joseph's lawyer required a good-faith basis that Trooper Will had some personal knowledge about Joseph's 2008 DUI conviction before the

lawyer could cross-examine the trooper on that topic. *See David v. State*, 28 P.3d 309, 312-13 (Alaska App. 2001) (prosecutor needed good-faith basis, i.e., offer of proof, for cross-examination of defense witness regarding allegations of sexual abuse). Joseph's lawyer candidly admitted he lacked a good-faith basis to cross-examine the trooper about the date of Joseph's 2008 conviction. [Tr. 331-32] As a result, the trial court did not abuse its discretion by precluding Joseph's cross-examination of the trooper on that topic.

C. The trial court's requirement that Joseph have some evidence that the trooper had any personal knowledge about Joseph's 2008 conviction did not shift the burden of proof

Joseph complained that the court was shifting the burden of proof. [Tr. 331] The court responded it was only requiring that Joseph present some evidence, i.e., the burden of production—a burden of coming forward with evidence that, if believed, would establish a relevant fact. [Tr. 331] *See Lindoff v. State*, 224 P.3d 152, 156 (Alaska App. 2010). The court was not requiring Joseph to bear the ultimate burden of proof, i.e., burden of persuasion—the burden of establishing a fact by a specific degree of proof. [Tr. 331] *See Stevens v. State, Alcoholic Beverage Control Bd.*, 257 P.3d 1154, 1160 (Alaska 2011). In other words, if Joseph made an offer of proof of some evidence suggesting that his conviction took place before July 15, 2008, outside the 10-year look-back period, then the ultimate burden of proof would remain on the state, which has

the burden of persuading the jury beyond a reasonable doubt that the conviction took place *on or after* that date and thus fell inside the period.

Joseph's attempt to show that one of his prior convictions fell outside the look-back period was a defense to the charge of felony refusal. Had he been able to do so, he would have had only one conviction inside the look-back period, which would have precluded his conviction of felony refusal; he still would have been guilty of misdemeanor refusal.

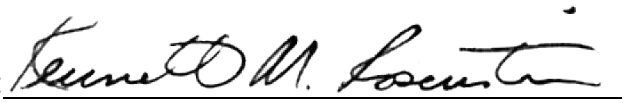
The burden of proof regarding a defense is set by AS 11.81.900(b)(19). To establish a defense, some evidence must be introduced to place the defense in issue; once some evidence is presented, the state then has the burden of disproving the defense beyond a reasonable doubt. AS 11.81.900(b)(19). This definition makes clear that the burden of proof regarding a defense does not shift from the state. Requiring a defendant to come forward with some evidence of a defense does not shift the burden of proof onto the defendant.

CONCLUSION

This court should remand Joseph's case so the trial court can determine whether the trooper's misinformation about the consequence of refusal induced Joseph's refusal to submit to a breath test. If the trial court determines Joseph was not induced, then his conviction should be affirmed.

DATED October 4, 2021.

TREG R. TAYLOR
ATTORNEY GENERAL

By: 

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